Supreme Court, U. S.
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MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1977

NO. 77-586

EUGENE J. McCARTHY, ET AL, Petitioners

v.

DOLPH BRISCOE, ET AL, Respondents

Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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October 21, 1977

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1977

NO. ----------

EUGENE J. McCARTHY, ET AL[*], Petitioners

v.

DOLPH BRISCOE, ET AL, Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

Petitioners pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit, entered in this proceeding on June 13, 1977.[1]

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[*] All Petitioners and Respondents are as follows: Eugene J. McCarthy, Paul Spragens, Ronald C. Engle, Janice Lindley Yeager, and James D. Clark, Petitioners; and Dolph Briscoe, Governor of Texas, and Mark W. White, Jr., Secretary of State of the State of Texas, Respondents.

CITATION TO ORDERS AND OPINIONS BELOW

The Order and Opinion of the three-judge district court entered September 2 and September 3, 1976, respectively, declaring Art. 13.50, Subdivision 1, of the Texas Election Code (Supp. 1975) unconstitutional is printed in Appendix 1 hereto, infra, page A-1, and are reported in 418 F. Supp. 819. The Order of the three-judge district court of September 7, 1976, denying Petitioner's Application for Stay is printed in Appendix 1 hereto, infra, page A-6. The Order of Mr. Justice Lewis F. Powell, Jr. as Circuit Justice for this court, entered September 14, 1976, denying Petitioner's Application for Injunctive Relief on jurisdictional grounds is printed in Appendix 2 hereto, infra, page A-17. The Order of the United States Court of Appeals, Fifth Circuit, on Application for a Partial Stay of Judgment and for Emergency Injunctive Relief, entered September 23, 1976, is printed in Appendix 1 hereto, infra, page A-7, and is reported in 539 F. 2d 1355 (1976). The Opinion entered June 13, 1977, and Order denying rehearing entered July 25, 1977, of the Court of Appeals, Fifth Circuit, is printed in Appendix 1 here-

to, infra, page A-16, and is reported in 553, F. 2d 1005.

The Order of Mr. Justice Lewis F. Powell, Jr., entered September 27, 1976, granting injunctive relief is printed in Appendix 2 hereto, infra, page A-19. The Opinion of Mr. Justice Lewis F. Powell, Jr., entered September 30, 1976, on granting injunctive relief is printed in Appendix 2 hereto, infra, page A-21.

JURISDICTION

The judgment of the Court of Appeals for the Fifth Circuit was entered on June 19, 1977. A timely petition for rehearing was denied on July 25, 1977, (Appendix 1, infra, page A-16) and this petition for certiorari was filed within 90 days of that date. The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1).

QUESTIONS PRESENTED

1

Whether a district court, upon finding a constitutional denial of Petitioner's rights by state officials under color of state law to be an '"intransigent and discriminatory position" and an "incomprehensible policy"" (a) should grant permanent injunctive relief requested, or (b) retain jurisdiction pending an opportunity for the state and its officials to voluntarily abandon such unconstitutional conduct.

2.

Whether Petitoners are entitled to attorneys fees pursuant to Title 42 USC Section 1973[1](e) or Title 42 USC Section 1988.

STATUTORY PROVISIONS

The statutory provisions involved are as follows:

Art. 13.50, Texas Election Code
Title 42 USC, Section 1973[1](e)
Title 42 USC, Section 1988

They are set forth in full in Appendix 2, infra, page A-32.

STATEMENT OF THE CASE

Art. 13.50 of the Texas Election Code (Supp. 1975), prescribed the only method by which independent candidates for public office could obtain positions printed on the general election ballot. Subdivision 1 as amended in 1975 of that article expressly excluded the offices of President, Vice-President, and Presidential Elector.

Petitioners brought the instant case in the district court prusuant to 28 USC Section 1343(3) and (4) and Section 2201, to enjoin Respondents from applying Art. 13.50, Texas Election Code (Supp. 1975), in a manner so as to deny Petitioner McCarthy's name on the 1976 general election ballot as an independent candidate for the office of President, and denying other Petitioners their right to vote for an independent candidate for the presidency of the

United States, and for permanent injunction against future application of Art. 13.50, The grounds for such suit were that the interpretation and application of Subdivision 1 of Art. 13.50 of the Texas Election Code (Supp. 1975), by Respondent was in irreconcilable conflict with the 1st and 14th Amendments to the United States Constitution as well as in conflict with and repugnant to Art. II, Section 1, Clauses 2 and 4 and Art. VI, Clause 2, of the United States Constitution and the 12th Amendment to the United States Constitution.[2]

This cause was heard in the district court on September 2, 1976, and on that date the district court entered an Order finding and declaring Art. 13.50, Subdivision 1, Texas Election Code (Supp. 1975), to be unconstitutional as it applied to independent candidates for the offices of President, Vice-President, and Presidential Elector, but denied injunctive relief. Thereafter, on September 3, 1976, the district court filed an opinion providing that Petitioners will take nothing by their suit and that each party will bear his own costs. (Appendix 1, infra, page A-1)

Petitioners sought emergency injunctive relief from the Circuit Justice of the United States Supreme Court and that relief was denied on September 14, 1976, on jurisdictional grounds. (Appendix 2, infra, page A-17)

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[2]Petitioners Engle and Spragens sought to be designated Presidential Electors pledged to the independent candidacy of Petitioner McCarthy.

After application for emergency injunctive relief to the Court of Appeals, Fifth Circuit, that court denied Petitioners relief on September 23, 1976. (Appendix 1, infra, page A-7)

Following the Court of Appeals denial of emergency injunctive relief, Petitioners again sought injunctive relief from the Circuit Justice of the United States Supreme Court, pending the filing of this petition and pursuant to that application, Mr. Justice Powell granted emergency injunctive relief on September 27, 1976, requiring Respondent Secretary of State White to place the name of Petitioner McCarthy on the 1976 general election ballot for the office of President of the United States as an independent candidate. (Appendix 2, infra, page A-19) On September 30, 1976, Mr. Justice Powell filed an opinion relative to the Order of September 27, 1976. (Appendix 2, infra, page A-21)

Petitioners thereafter pursued their appeal to the Court of Appeals for the Fifth Circuit seeking reversal of the judgment of the district court insofar as it failed to grant permanent injunctive relief against Respondents' interpretation and application of Subdivision 1, Art. 13.50, Texas Election Code (Supp. 1975) so as to exclude candidates or the offices of President, Vice-President, and Presidential Elector and requested the Court of Appeals to remand the case to the district court for entry of an Order providing such injunctive relief and for a hearing on attorneys fees as provided by 42 U.S.C. Section 1973[1](e).

After oral argument, the Court of Appeals affirmed the judgment of the district court. (Appendix 1, infra, page A-11) The basis upon which the Court of Appeals denied a remand and injunctive relief was a finding that "any possibility that the State of Texas will attempt to enforce the statute in any future presidential election is speculative at best". (Appendix 1, infra, page A-15)

The conclusion of the Court of Appeals was made in the face of the fact that Respondent White, the chief election officer of the state, was himself without any state statutory authority or federal injunctive direction upon which he could place an independent candidate for President, Vice-President, or Presidential Elector on the general election ballot of the State of Texas following the district court's declaration that Subdivision 1, Art. 13.50 of the Texas Election Code (Supp. 1975) was unconstitutional. In this regard the attorney for Respondent advised the Court of Appeals in oral argument that if "General Magnifico" were to seek a ballot position as an independent candidate for President, that Respondents would deny her the right to have her name placed on the ballot.[3]

Subdivision 1 of Art. 13.50 of the Texas Election Code (Appendix 3, infra,

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[3]Rules of the Court of Appeals for the Fifth Circuit provide for the transcription of oral argument for the use of judges only and such transcriptions are not available to counsel for parties.

page A-32) was amended more than a year after this Court's decision in Storer v. Brown 415 U.S. 724 (1974) and Lubin v. Panish 415 U.S. 709 (1974). Prior to the 1975 amendment to Art. 13.50 of the Texas Election Code it provided ballot access to independent candidates for President.

Petitioners timely filed Motion for Re-Hearing was denied on July 25, 1977. (Appendix 1, infra, page A-16)

REASONS FOR GRANTING THE WRIT

1

District courts should grant adequate permanent relief by injunction prohibiting unconstitutional conduct of state officials acting under color of state law upon evidence of such conduct or retain jurisdiction for additional relief if such becomes necessary in the future.

The district court, in its haste to deny Petitioners injunctive relief for the 1976 election failed even to address the question of injunctive relief for future elections and directed that "Plaintiffs take nothing by their suit and each party bear his own cost". (Appendix 1, infra, page A-5)

Upon the district court's declaration that Subdivision 1, Art. 13.50, Texas Election Code, was unconstitutional, Respondents Briscoe and White had no authority upon which to afford any independent candidate for the office of President a position on the Texas

general election ballot even if they were inclined to do so. There was no statutory procedure by which such an applicant for a position on the ballot could establish some reasonable criteria for such position, that is, a showing of serious candidacy and community support. Absent statutory authority and guidelines for a position on the ballot or injunctive direction by Federal judicial decree, Respondents were left without criteria to conform their action to allow or deny persons seeking ballot position as independent candidates for President of the United States. No criteria existed to distinguish between serious candidates such as Petitioner McCarthy and candidates of questionable seriousness such as "General Magnifico". It is, no doubt, this absence of criteria that caused the attorney for Respondent to, without hesitation, in reponse to an inquiry by one of the judges of the Court of Appeals at oral argument state that Respondents would not allow "General Magnifico" a position on the ballot as an independent candidate for President of the United States.

The conduct of the Respondents in denying constitutional rights to Petitioner until enjoined from so doing by the September 27, 1976, Order of Mr. Justice Powell, fully demonstrates that Petitioners were entitled to permanent injunctive relief, particularly when taken with the fact that Art. 13.50, Subdivision 1, Texas Election Code, was amended in 1975 so as to deny these Petitioners rights so clearly established by this court in 1974 in its

opinion in Storer v. Brown, supra, and Lubin v. Panish, supra. It was only after Petitioners pursued the claim for permanent injunctive relief to the Court of Appeals that the Texas Legislature enacted legislation providing ballot access to independent candidates for the offices of President, Vice-President, and Presidential Elector.

While it is in some instances appropriate for district courts to declare state statutes unconstitutional, and defer the granting of injunctive relief so as to afford the state the opportunity to conform their statutes to the United States Constitution, district courts in such instances hould retain jurisdiction to grant injunctive relief if the state fails to exercise such opportunity, rather than providing that "Plaintiffs will take nothing by their suit and each party will bear his own costs". (Appendix 1, infra, page A-6)

The Court of Appeals improperly placed the burden of showing future conduct of Respondents on Petitioners as a condition of granting future injunctive relief.

The Texas Legislature, after oral argument in the Court of Appeals adopted corrective legislation which may render the question of permanent injunctive relief moot. This was suggested by Petitioners in a post-argument motion. Under these circumstances the Court of Appeals should have remanded the case to the district court for further hearing on attorneys fees pursuant to Title 42 U.S.C.

Section 1973[1](e) and Title 42 U.S.C. Section 1988.

2.

Title 42 U.S.C. Section 1973[1](e) and Title 42 U.S.C. Section 1988 were designed to afford persons whose rights as guaranteed by the United States Constitution are abridged meaningful access to the judicial process to vindicate such rights. Termination of the unconstitutional practice after initiation of litigation should not defeat the right to an award of attorneys fees necessarily incurred to vindicate such rights. The finding by the Court of Appeals that future denial was "speculative at best" can hardly afford that Court the discretion of denying attorneys fees authorized under 42 U.S.C. Section 1973[1](e) and 42 U.S.C. Section 1988, to a party who has successfully vindicated his constitutional rights even if such vindication is the result of legislation brought about by the litigation.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Court of Appeals for the Fifth Circuit.

Respectfully submitted,

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APPENDIX I: OPINIONS BELOW

Eugene J. McCARTHY, et al.

v.

The Honorable Dolph BRISCOE, Governor, State of Texas, and the Honorable Mark White, Secretary of State of Texas.

Civ. A. No. A-76-CA-158.

United States District Court,

W. D. Texas,

Austin Division.

Judgment Sept. 2, 1976.

Opinion Sept. 3, 1976.

Before GEE, Circuit Judge, and SPEARS and WOOD, District Judges.

JUDGMENT

On this the 2nd day of September, 1976, came on for hearing at Austin, Texas, the above styled and numbered cause before the undersigned constituting a three-judge Court convened by authority of Honorable John R.Brown, Chief Judge, United States Court of Appeals for the Fifth Circuit; and the Court having considered the pleadings, briefs, stipulations, evidence, and ar-

guments of Counsel finds and concludes as follows:

(1) That Art. 13.50, Subdivision 1 of the Texas Election Code (Supp. 1975), as it applies to independent Candidates for the offices of President, Vice-president, and presidential elector, is unconstitutional.

(2) That there is insufficient time remaining before the general election begins on October 13, 1976, when absentee voting begins, in which to allow the Plaintiff to demonstrate substantial support in the community, and, thereafter, to afford the Secretary of State a reasonable opportunity to verify signatures on any petition(s) submitted and prepare the ballots, as required by the Texas Election Code. In this connection, Plaintiff has failed to show diligence in his efforts to have his name printed on the ballot in Texas, but, on the contrary, by reason of the late filing of this lawsuit (July 30, 1976) he has made it impractical, if not impossible, for this Court to grant him the relief sought without disrupting the entire election process in this state, which this Court is unwilling to do under the circumstances.

It is, therefore, Ordered, Adjudged and Decreed that Art. 13.50, Subdivision 1 (Supp. 1975), of the Texas Election Code, as it applies to President, Vice-president, and presidential elector, is hereby declared to be unconstitutional.

It is further Ordered, Adjudged, and Decreed that this Court is unwilling to allow Plaintiff's name to be printed on the ballot for the general election without a showing of substantial support in the community, and since the Plaintiff by his laches, has made it impractical, if not impossible, for this Court to grant him the alternative relief sought, such relief prayed for is hereby denied.

Nothing herein, of course, should be construed as adversely affecting Plaintiff McCarthy's right to conduct a write-in campaign pursuant to Art. 6.05, Subdivision 3, and Art. 6.06 of the Texas Election Code.

The Court reserves the right to later file an opinion expressing its views in greater detail.

OPINION

PER CURIAM:

Texas provides no means of access to its ballot for independent candidates for the offices of president, vice-president or presidential elector. Such aspirants are remitted to the organization of a new party (if they wish their names printed on the ballot) or to write-in campaigns.[1]

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[1]The Texas Election Code provisions for attaining ballot position by petitions demonstrating substantial community support was amended effective September 1,

1975 to deny their use specifically to such candidates, TEX. REV. CIV. STAT. ANN. art. 13.50, subdiv. 1 (Supp. 1976).

Storer v. Brown, 415 U.S. 724, 746(1974), clearly precludes the state from forcing a candidate to establish a political party to attain ballot position. It also indicates that unreasonably burdensome procedures for such candidates to obtain ballot position are constitutionally invalid. Here the procedures were not even unreasonably burdensome; there were none. Lubin v. Panish, 415 U.S. 709, 719 n.5 (1974), strongly reinforces the necessary inference from Storer that such a remission to a mere write-in campaign is not an acceptable alternative to reasonable procedures for obtaining ballot position. We hold that Texas Election procedures are constitutionally invalid for the failure noted, especially in view of their singling out three offices only from the mass for discriminatory treatment.

We regret, however, that for no sufficient reason the matter comes before us too late for us to fashion meaningful relief without substantially disrupting the entire Texas election scheme, which is already in process. The candidate's testimony is that limitations of time and resources simply did not permit him to get around to the matter sooner, and we have no reason to doubt its truth. But this circumstance was not occasioned by any fault of the state, which had early made its intransigent and discriminatory

position in the matter clear. Balancing the equities, and deploring the time limitations which compel us to choose between standing by and permitting this incomprehensible policy to achieve its apparent objective or substantially burdening the entire general election at the behest of one who has at least dawdled over his rights, we conclude that injunctive interference by us at this late stage would not be warranted.

For the convenience of the parties and of the reviewing Court or Justice, we state our reasons briefly, thinking promptness more appropriate to the circumstances than exhaustiveness. Plaintiffs will take nothing by their suit, and each party will bear his own costs.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

CA A-76-CA-158

EUGENE A. McCARTHY, ET AL
VS.
DOLPH BRISCOE, ET AL

ORDER

On this day plaintiffs McCarthy, et al's Application for Stay was presented and after examination of said application, the undersigned is of the opinion that such stay should be in all things denied.

IT IS THEREFORE ACCORDINGLY ORDERED that plaintiffs McCarthy et al's Application for Stay of the Court order of September 2, 1976, be and it is in all things denied, including their application for stay of the order of September 2, 1976, pending appeal to the United States Supreme Court.

SIGNED this 7th day of September, 1976.

/s/ THOMAS GIBBS GEE
U.S. CIRCUIT JUDGE

EUGENE J. McCARTHY, et al.,
Plaintiffs-Appellants,

v.

DOLPH BRISCOE, Governor of Texas, et al.,
Defendants-Appellees

No. 76-3539

United States Court of Appeals
Fifth Circuit

Sept. 23, 1976

Appeal from the United States District Court for the Western District of Texas.

ON APPLICATION FOR A PARTIAL STAY OF JUDGMENT AND FOR EMERGENCY INJUNCTIVE RELIEF

Before GODBOLD, DYER and HILL, Circuit Judges.

PER CURIAM:

This suit was filed on July 30, 1976 by appellants against Dolph Briscoe, Governor of Texas and Mark W. White, Jr., Secretary of State of the State of Texas, seeking to have the name of Eugene McCarthy placed upon the November, 1976 general election ballot in Texas as an independent candidate for the presidency of the United States and declaring Paul Spragens and Ronald C. Engle electors pledged to the candidacy of McCarthy.

A three-judge district court was de-

signated and a trial of the case was had on September 2, 1976. The court declared Article 13.50 of the Texas Election Code unconstitutional as it applies to independent candidates for the offices of president, vice-president and presidential elector, and specifically as it applied to McCarthy. Neither immediate nor prospective injunctive relief was granted by the court. An application for stay was denied by the court and notice of appeal to the United States Supreme Court was filed September 7, 1976. On September 14, 1976, Mr. Justice Powell denied a partial stay of the district court's judgment and on September 16, 1976, a notice of appeal to this Court was filed.

An application for stay and emergency injunctive relief is sought based solely upon the failure of the district court to grant injunctive relief. In its judgment the district court found:

> "That there is insufficient time remaining before the general election begins on October 13, 1976, when absentee voting begins, in which to allow the plaintiff to demonstrate substantial support in the community, and, thereafter, to afford the Secretary of State a reasonable opportunity to verify signatures on any petition(s) submitted and prepare the ballots, as required by the Texas Election Code."

The court further found:

"By reason of the late filing of this law suit (July 30, 1976) he has made it impractical, if not impossible, for this Court to grant him the relief sought, without disrupting the entire election process in this state, which this Court is unwilling to do under the circumstances."

The court further said in its opinion:

"Balancing the equities, and deploring the time limitations which compel us to choose between standing by and permitting this incomprehensible policy to achieve its apparent objective, or substantially burdening the entire general election at the behest of one who has at least dawdled over his rights, we conclude that injunctive interference by us at this late stage would not be warranted."

Although appellants assert that there is time to direct the placement of McCarthy's name on the ballot conditioned upon his satisfying some petition requirement designed by the Court to demonstrate community support, they neither suggest how this could be accomplished, now how we or the district court could formulate such a procedure that would be effective in time to carry out in an orderly way the preparation of the ballot and the conduct of the election. We are thus regretfully constrained to agree with the district court that because the complaint was so lately filed there is

insufficient time for a court to devise a petition requirement for ascertaining whether McCarthy has substantial community support in Texas without disrupting the entire election process in that state. Williams v. Rhodes, 1968, 393 U.S. 23, 89 S.Ct. 5, 21 L.Ed.2d 24. See Hadnott v. Amos, 1968, 393 U.S. 904, 89 S.Ct. 1101, 22 L.Ed.2d 336.

The application for a partial stay of the district court's judgment of September 2, 1976 and for emergency injunctive relief is denied.

EUGENE J. McCARTHY, et al.,
Plaintiffs-Appellants,

v.

DOLPH BRISCOE, Governor of Texas, et al.,
Defendants-Appellees

No. 76-3539

United States Court of Appeals
Fifth Circuit

June 13, 1977

Rehearing Denied July 25, 1977.

Appeal from the United States District Court for the Western District of Texas.

Before AINSWORTH and MORGAN, Circuit Judges, and LYNNE*, District Judge.

OPINION

LYNNE, District Judge:

Plaintiff-Appellants brought this action pursuant to 42 U.S.C. §§ 1983 and 1985, and 28 U.S.C. §§ 1343(3)(4), 2201, 2281, and 2284 for injunctive and declaratory relief seeking annulment and interdicting future enforcement of Texas laws which prohibit electoral consideration of independent candidates for the

*Senior District Judge of Northern District of Alabama sitting by designation.

offices of President and Vice-Presient of the United States of America. The suit was filed July 30, 1976,[1] some three months prior to the 1976 presidential election, by presidential candidate Eugene J. McCarthy, two presidential elector candidates pledged to McCarthy, and two voter-supporters of McCarthy. Thereafter, McCarthy gave formal notice of his candidacy for President by filing with Texas' Secretary of State, appellee White,[2] a Declaration of Intent to Run as an Independent Candidate.

On September 2, 1976, a three-judge court[3] heard the case and adjudicated

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[1]The complaint was filed in the United States District Court for the Northern District of Texas. On August 6, 1976, the cause was transferred to the Western District.

[2]The other defendant-appellee is Texas Governor Dolph Briscoe.

[3]The hearing was before Circuit Judge Thomas Gibbs Gee and District Judges Adrian A. Spears and John H. Wood, Jr.

that Article 13.50(1)[4] of the Texas Election Code is unconstitutional as applied to presidential and vice-presidential candidates, but that McCarthy, having failed to show diligence in his efforts to have his name printed on the Texas ballot and by his late filing of the lawsuit, had made it impracticable, if not impossible, for the court to grant him the injunctive relief sought. Accordingly, the court did not order that McCarthy's name be included on the ballot. Plaintiffs have appealed from the denial of the permanent injunction.

On September 16, 1976, appellants appealed to this Court for a partial stay and emergency injunctive relief, which were denied on the ground that "the complaint was so lately filed there is insufficient time for a court to devise a petition requirement for ascertaining whether McCarthy has substantial com-

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[4]Article 13.50 (1) of the Texas Election Code provides: "This section applies to nonpartisan or independent candidates for federal, state, district, county and precinct offices in the general election provided for in Art. 2.01. A person may run as a nonpartisan or independent candidate for any such office, other than the offices of President, Vice-President, and Presidential elector, by complying with this section and other applicable provisions of this Code."

munity support[5] in Texas without disrupting the entire election process in that state." McCarthy v. Briscoe, 539 F.2d 1353, 1355 (5th Cir. 1976).

On September 24, appellants applied ex parte for injunctive relief to Mr. Justice Powell, Circuit Justice, who granted the application and ordered McCarthy's name to appear on the general election ballot in Texas as an independent candidate for the office of President of the United States in 1976. McCarthy v. Briscoe, ____ U.S. ____, 97 S.Ct. 10, 50 L.Ed2d 49 (1976). Such order was complied with.

This appeal raises the single contention that the three-judge court erred in failing to grant permanent relief enjoining future application of Article 13.50 of the Texas Election Code by denying independent candidates for President and Vice-President of the United States the right to have their names printed on the general election ballot in Texas. Appellants also seek an award of attorney's fees.

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[5]The validity of the "community support" requirement derives from Storer v. Brown, 415 U.S. 724, 746-47, 94 S.Ct. 1274, 39 L.Ed2d 714 (1974).

INJUNCTION DENIAL

A grant or denial of injunctive relief lies within the trial court's sound discretion. Frostie Company v. Dr. Pepper Company, 361 F.2d 124 (5th Cir. 1966). Injunctive remedy is discretionary and it is properly withheld when the controversy is not ripe for judicial resolution. Abbott Laboratories v. Gardner, 387 U.S. 136, 148, 87 S.Ct. 1507, 18 L.Ed.2d 681 (1967).[6] In view of the three-judge court's ruling that the Texas election statute is unconstitutional as applied to presidential candidates, together with Mr. Justice Powell's order that required Mr. McCarthy to be listed on the 1976 ballot, any possibility that the State of Texas will attempt to enforce the statute in any future presidential election is speculative at best. This Court presumes that Texas Will not defy the holding of unconstitutionality in the absence of an injunction.

Moreover, a denial of injunctive relief at this stage would not subject appellants to any immediate or irrepar-

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[6]Although Abbott dealt with anticipatory review of federal administrative regulations, its warning against premature injunctions has been heeded outside the administrative realm, and is appropriate here. See, e.g., Broderick v. di Grazia, 504 F.2d 643 (1st Cir. 1974).

able injury. Whatever imminent hardship existed at the time this suit was filed has already been avoided by the injunction directed at the 1976 Texas ballot. Clearly, the three-judge court did not abuse its discretion by refusing to enjoin future application of a statute whose sanctions have not been set in motion and may never be enforced against the individuals on whose behalf relief is sought. See International Longshoremen's & Warehousemen's Union v. Boyd, 347 U.S. 222, 74 S.Ct. 447, 98 L.Ed. 650 (1945).

ATTORNEY'S FEES

This Court is authorized, in its discretion, to allow a reasonable attorney's fee as part of the prevailing party's costs. 42 U.S.C.A. § 1988 (as amended by P.L. 94-559, § 2, Oct. 19, 1976). In view of appellant's lack of success on this appeal, the Court declines appellant's request for an attorney's fee.

The judgment appealed from is AFFIRMED.

ON PETITION FOR REHEARING
(July 25, 1977)

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby denied.

APPENDIX II: ORDERS & OPINION OF CIRCUIT JUSTICE LEWIS F. POWELL, JR.

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1975

NO. A-201

EUGENE J. McCARTHY, PAUL SPRAGENS
RONALD C. ENGLE, JANICE LINDLEY YEAGER,
and JAMES D. CLARK
Petitioners
V.

DOLPH BRISCOE, Governor of Texas,
and MARK W. WHITE, JR., Secretary of
State of the State of Texas
Respondents

OPINION
(September 14, 1976)

Mr. Justice Powell, Circuit Justice.

This application, for a partial stay of an order and judgment of a three-judge District Court for the Western District of Texas, reaches me during the summer recess of the Court. Following a practice utilized by other Justices and by myself on previous occasion, see, e.g., Graves v. Barnes, 405 U.S. 1201 (Opinion of Powell, J., in Chambers, 1972), I have consulted informally with each of my Brethren who was available.* Although no other Justice has partici-

pated in the drafting of this order, I am authorized to say that each of those consulted would vote to deny the application for the reason stated below.

In denying injunctive relief to petitioners, the three-judge District Court based its action not upon resolution of the merits of the constitutional claim presented (which it resolved in favor of petitioners) but upon the equitable doctrine of laches. I conclude, therefore, that direct appeal to this Court does not lie under 28 U.S.C. § 1253, MTM, Inc. v. Baxley, 420 U.S. 799, 804 (1975), and that the Court is without jurisdiction to grant the relief now requested. Accordingly, the application for a stay is denied, but without prejudice to the right of petitioners to seek relief in the Court of Appeals.

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*All members of the Court, save two who were not available, have been consulted.

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1975

NO. A-247

EUGENE J. McCARTHY, PAUL SPRAGENS
RONALD C. ENGLE, JANICE LINDLEY YEAGER,
and JAMES D. CLARK
Petitioners

V.

DOLPH BRISCOE, Governor of Texas,
and MARK W. WHITE, JR., Secretary of
State of the State of Texas
Respondents

ORDER
(September 27, 1976)

Mr. Justice Powell, Circuit Justice

Treating Petitioners' application for a partial stay of an order and judgment of the United States Court of Appeals for the Fifth Circuit entered on September 23, 1976, as an application for an injunction pursuant to 28 U.S.C. § 1651 and Rules 50 and 51 of this Court, and upon consideration thereof.

It is ordered that the application be granted and that Mark W. White, Jr., Secretary of State of the State of Texas, place, or cause to be placed, the name of Eugene J. McCarthy on the November 1976 general election ballot in Texas as an independent candidate for the office of

President of the United States.*

An opinion will follow.

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*I have consulted informally with each of my Brethren and am authorized to say that a majority of the Court would grant the application. Mr. Justice White and Mr. Justice Rehnquist have asked to be recorded as holding a different view.

IN THE
SUPREME COURT OF THE UNITED STATES

NO. A-247

EUGENE J. McCARTHY, PAUL SPRAGENS
RONALD C. ENGLE, JANICE LINDLEY YEAGER,
and JAMES D. CLARK
Petitioners
V.

DOLPH BRISCOE, Governor of Texas,
and MARK W. WHITE, JR., Secretary of
State of the State of Texas
Respondents

OPINION
(September 30, 1976)

MR. JUSTICE POWELL, Circuit Justice.

This is an application for injunctive relief[1], presented to me as Circuit Justice. The applicants, former Senator

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[1]Although the application is styled "Application for a partial stay of an order and judgment of the United States Court of Appeals, Fifth Circuit," the applicants actually seek affirmative relief. I have therefore treated the papers as an application for an injunction pursuant to 28 U.S.C. § 1651 and Rules 50 and 51 of this Court.

Eugene J. McCarthy and four Texas voters who support Senator McCarthy's independent candidacy for President, have asked that I order Senator McCarthy's name placed on the 1976 general election ballot in Texas. They sought relief without success from a three-judge District Court for the Western District of Texas and, on appeal, from the Court of Appeals for the Fifth Circuit.[2] Upon consideration of the record before me, I have concluded that the courts below erred in failing to remedy a clear violation of the applicant's constitutional rights. I have therefore granted the requested relief.

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[2]The applicants filed an initial application in this Court for a stay of the District Court order on September 8, 1976, before they had filed an appeal to the Court of Appeals. In my capacity as Circuit Justice, I denied that request on September 14 on the ground that this Court was without jurisdiction to entertain a direct appeal from the District Court under 28 U.S.C. § 1253. See MTM, Inc. v. Baxley, 420 U.S. 799, 804 (1975). I specified that the denial was without prejudice to the applicant's right to seek relief in the Court of Appeals. The applicants filed a notice of appeal in the Court of Appeals on September 16; the Court of Appeals denied their request for interlocutory relief on September 23; and the applicants renewed their application here the following day.

Effective September 1, 1975, Texas amended its Election Code so as to preclude candidates for the office of President from qualifying for position on the general election ballot as independents. Acts of 1975, c.682, § 23, codified in Tex. Election Code, Art. 13.50, Subdiv. 1 (Supp. 1976). Before that date independent candidates for all offices had been able to gain access to the ballot by submitting a prescribed number of voter's signatures by a deadline several months in advance of the general election. Tex. Election Code, Arts. 13.50, 13.51 (1967); see American Party of Texas v. White, 415 U.S. 767, 788-791 (1974). Under the new law that method of qualifying for the ballot was carried forward for most offices, but not for the office of President.[3] A presidential candidate must now be a member of a political party as a precondition to securing a place on the ballot. An independent candidate can seek election as

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[3]Candidates for the offices of Vice-President and presidential elector are similarly excluded from qualifying as independents. Art. 13.50, Subdiv. 1 (Supp. 1976). Although two of the applicants are candidates for the office of presidential elector, they have not specifically sought relief with respect to their own candidates. My order of September 27 is sufficiently broad to encompass such relief as may be necessary to perfect Senator McCarthy's qualification for general election.

President only by joining or organizing a political party, Tex. Election Code Arts. 13.02, 13.45 (Supp. 1976), or by mounting a campaign to have his supporters "write in" his name on election day, id., Arts. 6.05, 6.06 (Supp. 1976).

On July 30, 1976, the applicants filed this suit in the District Court, claiming that Art. 13.50 of the Texas Election Code, as amended, violated the rights "secured to them under Article II, Section 1, Clauses 2 and 4, and Article VI, Clause 2 of the United States Constitution and the First, Twelfth and Fourteenth Amendments thereto." The applicants asked the court to order Senator McCarthy's name placed on the ballot, or, alternatively, to devise reasonable criteria by which Senator McCarthy might demonstrate support for his candidacy as a means of qualifying for ballot position. The applicants submitted affidavits that tended to show that Senator McCarthy was a serious presidential aspirant with substantial support in many States.

The Defendants, the Governor and Secretary of State of the State of Texas, denied that the new law was unconstitutional and claimed that Senator McCarthy was barred by laches from obtaining the injunctive relief he requested. In support of the laches claim, the defendants presented the affidavit and later the live testimony of Mark W. White, Jr., the Secretary of State, to the effect that it would be impossible in the time remaining before the November election for the State to verify that Senator

McCarthy had substantial support among Texas voters.

On September 2, 1976, the District Court held that the Texas law, as amended, was constitutionally invalid for failure to provide independents a reasonable procedure for gaining ballot access, but declined to enter injunctive relief. The court perceived its only choice to be one

> "between standing by and permitting this incomprehensible policy to achieve its apparent objective or substantially burdening the entire general election at the behest of one who has at least dawdled over his rights...." Memorandum Opinion, at 2.

Believing it to be "too late for us to fashion meaningful relief without substantially disrupting the entire Texas election scheme," the court concluded that injunctive relief was not warranted. Ibid.

On September 23, 1976, the Court of Appeals denied the applicants request for emergency injunctive relief on the same basis:

> "We are...regretfully constrained to agree with the District Court that because the complaint was so lately filed there is insufficient time for the Court to devise a petition requirement for ascertaining whether McCarthy has substantial community support in Texas without disrupting the entire election process in that state...."

The following day, September 24, 1976, the applicants presented this application to me as Circuit Justice.

The new Texas law precluding independent candidates for President from gaining access to the general election ballot as independents raises no novel issue of constitutional law. In Storer v. Brown, 415 U.S. 724 (1974), the Court flatly rejected the notion that an independent could be forced to seek ballot position by joining or organizing a political party:

> "It may be that the 1% registration requirement is a valid condition to extending ballot position to a new political party. Cf. American Party of Texas v. White, [415 U.S., at] 767. But the political party and the independent candidate approaches to political activity are entirely different and neither is a satisfactory substitute for the other. A new party organization contemplates a statewide, ongoing organization with distinctive political character. Its goal is typically to gain control of the machinery of state government by electing its candidates to public office. From the standpoint of a potential supporter, affiliation with the new party

would mean giving up his ties with another party or sacrificing his own independent status, even though his possible interest in the new party centers around a particular candidate for a particular office. For the candidate himself, it would mean undertaking the serious responsibilities of qualified party status...such as the conduct of a primary, holding party conventions, and the promulgation of party platforms. But more fundamentally, the candidate, who is by definition an independent and desires to remain one, must now consider himself a party man, surrendering his independent status. Must he necessarily choose the political party route if he wants to appear on the ballot in the general elections? We think not." Id., at 745-746.

And in Lubin v. Panish, 415 U.S. 709 (1974) the Court characterized as "dubious at best" the intimation that a write-in provision was an acceptable means of ballot access:

> "The realities of the electoral process...strongly suggest that 'access' via write-in votes falls far short of access in terms of having the name of the candidate on the ballot... That disparity would, itself, give rise to constitutional questions...." Id., at 719 n.5.

In view of these pronouncements, the District Court was fully justified in characterizing the new Texas law-enacted little more than a year after Storer and Lubin were decided-as demonstrating an "intransigent and discriminatory position" and an "incomprehensible policy."

Despite this recognition of the clear constitutional infirmity of the Texas statute, the District Court refused to grant the requested relief. The District Court, and the Court of Appeals, apparently assumed that the only appropriate remedy was to order implementation of the former statutory procedure permitting independent presidential candidates to demonstrate substantial support by gathering a prescribed number of voters' signatures-a procedure still available to independent candidates for most other elective offices. Since the signature-gathering procedure involved not only a filing deadline which had long since expired but also a lengthy process of signature verification, both lower courts concluded that there was too little time to impose a signature-gathering requirement without undue disruption of the State's electoral process.

This Court will normally accept findings of a district court, affirmed by a court of appeals, on factual considerations such as those underlying a determination of laches. But acceptance of findings of fact does not in this case require acceptance of the conclusion that violation of the applicants' constitutional rights must go unremedied. In

assuming that a signature-gathering process was the only available remedy, the courts below gave too little recognition to the amendment passed by the Texas Legislature making that very process unavailable to independent candidates for the office of President. In taking that action, the Texas Legislature provided no means by which an independent presidential candidate might demonstrate substantial voter support. Given this legislative default, the courts were free to determine on the existing record whether it would be appropriate to order Senator McCarthy's name added to the general election ballot as a remedy for what the District Court properly characterized as an "incomprehensible policy" violative of constitutional rights. This is a course that has been followed before both in this Court, see Williams v. Rhodes, 89 S.Ct. 1. (Opinion of STEWART, J., in-Chambers, 1968), and, more recently, in three District Court decisions involving Senator McCarthy, McCarthy v. Noel, No. 76-0402 (R. I. Sept. 24, 1976); McCarthy v. Tribbitt, No. 76-300 (Del. Sept. 16, 1976); McCarthy v. Askew, No. 76-1460-Civ-NCR (Fla. Sept. 15, 1976).

In determining whether to order a candidate's name added to the ballot as a remedy for a State's denial of access, a court should be sensitive to the State's legitimate interest in preventing "laundry list" ballots that "discourage voter participation and confuse and frustrate those who participate." Lubin v. Panish, supra, 415 U.S., at 715. But where a state forecloses independent

candidacy in presidential elections by affording no means for a candidate to demonstrate community support, as Texas has done here, a court may properly look to available evidence or to matters subject to judicial notice to determine whether there is reason to assume the requisite community support. See McCarthy v. Askew, supra, Memorandum Opinion, at 6.

It is not seriously contested that Senator McCarthy is a nationally known figure; that he served two terms in the United States Senate and five in the United State House of Representatives; that he was an active candidate for the Democratic nomination for President in 1968, winning a substantial percentage of the votes cast in the primary elections; and that he has succeeded this year in qualifying for position on the general election ballot in many States. The defendants have made no showing that support for Senator McCarthy is less substantial in Texas than elsewhere.

For the reasons stated, I have ordered that the application be granted and that the Secretary of State place the name of Eugene J. McCarthy on the November 1976 general election ballot in Texas as an independent candidate for the office of President of the United States.[4]

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[4]The order granting the application was issued on September 27, 1976. The Texas Election Code does not appear to prescribe a deadline for the printing of

I have consulted informally with each of my Brethren and, although no other Justice has participated in the drafting of this opinion, I am authorized to say that a majority of the Court would grant the application.[5]

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ballots for the general election. The earliest date when printed ballots are required for any purpose is October 13, 20 days before the election, when the statutory period for absentee voting by mail begins. Art. 5.05, Subdiv. 4(a) (Supp. 1974). Ballots are to be mailed to persons outside the United States "as soon as possible after the ballots become available, but not earlier than [October 3]," Art. 5.05, Subdiv. 4e, and to others intending to vote by mail on October 13 "or as soon thereafter as possible," Art. 5.05, Subdiv. 4(b). Political parties are not required to certify their nominees to the Secretary of State until September 28, Art. 11.04 (1967), and the Secretary of State is not required to certify the names of those who have qualified for ballot position to local election officials until October 3, Art 1.03, Subdiv. 2 (Supp. 1976). Thus there appears to be ample time to add Senator McCarthy's name.

[5]MR. JUSTICE WHITE, MR. JUSTICE MARSHALL, MR. JUSTICE BLACKMUN, and MR. JUSTICE REHNQUIST have asked to be recorded as holding a different view.

APPENDIX III: STATUTORY PROVISIONS INVOLVED

1. Article 13.50, TEXAS ELECTION CODE (Supp. 1975)

Art. 13.50 Nonpartisan or independent candidate

Subdivision 1. This section applies to nonpartisan or independent candidates for federal, state, district, county, and precinct offices in the general election provided for in Section 9 of this code (Article 2.01, Vernon's Texas Election Code). A person may run as a nonpartisan or independent candidate for any such office, other than the offices of president, vice president, and presidential elector, by complying with this section and other applicable provisions of this code.

2. Title 42 U.S.C. Section 1973[1](e)

In any action or proceeding to enforce the voting guarantees of the fourteenth or fifteenth amendment, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

3. Title 42 U.S.C. Section 1988

The jurisdiction in civil and criminal matters conferred on the district courts by the provisions of this chapter and Title 18, for the protection of all persons in the United States in their civil

rights, and for their vindication, shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; but in all cases where they are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offenses against law, the common law, as modified and changed by the constitution and statutes of the State wherein the court having jurisdiction of such civil or criminal cause is held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern the said courts in the trial and disposition of the cause, and, if it is of a criminal nature, in the infliction of punishment on the party found guilty. In any action, or proceeding to enforce a provision of sections 1981, 1982, 1983, 1985, and 1986 of this title, title IX of Public Law 92-318, or in any civil action or proceeding, by or on behalf of the United States of America, to enforce, or charging a violation of, a provision of the United States Internal Revenue Code, or title VI of the Civil Rights Act of 1964, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.